

1 PAUL B. SNYDER
2 United States Bankruptcy Judge
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6 MARK L. HATCHER
7 CLERK U.S. BANKRUPTCY COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA
10 _____DEPUTY

11 **UNITED STATES BANKRUPTCY COURT**
12 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

13 In re:

14 FRANCIS D. KOBLAK and KATHRYN A.
15 KOBLAK,

16 Debtors.

17 PAM LIESKE,

18 Plaintiff,

19 v.

20 FRANCIS D. KOBLAK and KATHRYN A.
21 KOBLAK,

22 Defendants.

Case No. 05-43012

Adversary No. 05-4138

MEMORANDUM DECISION

NOT FOR PUBLICATION

23 Trial was held in this matter on January 25, 2006. Pam Lieske (Plaintiff), in accordance
24 with her complaint, seeks to have the debt owed to her by Francis D. and Kathryn A. Koblak
25 (Debtors) declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Based on the
evidence, pleadings and arguments presented, the Court's findings of fact and conclusions of
law are as follows:

FINDINGS OF FACT

On May 18, 2002, the Debtors accepted the Plaintiff's offer to purchase their home located at 4925 Parkway Drive, Garfield Heights, Ohio (Residence). The Residence was 52 years old at the time of purchase. The State of Ohio Department of Commerce Residential Property Disclosure Form (Disclosure Form) completed and signed by the Debtors includes a representation by the Debtors that they did not know "of any current leaks, backups or other material problems with the sewer system servicing the property." The Debtors also represented in the Disclosure Form that they did not "know of any current water leakage, water accumulation, excess dampness or other defects with the basement/crawl space." In response to the inquiry regarding repairs, alterations or modifications to the property or other attempts to control any water or dampness problems in the basement or crawl space within the past five years, the Debtors disclosed, "[w]e had problems with water back up until they cleaned the roots out of the City Sewer two blocks[;] haven't had a problem since." The Debtors further represented that they did not "know of any current flooding, drainage, settling or grading problems affecting the property." Although the Plaintiff had her own inspection of the home performed, she relied heavily on the Disclosure Form when purchasing the Residence.

The Debtors owned the Residence from 1993 until 2002. In the prior Disclosure Form completed in 1993, the previous owners disclosed multiple drainage/flooding problems with the Residence, including "spring sewer backed up – City cleaned sewer and has not backed up since (cleaned street sewer)." Additionally, the previous owners stated that they would get a small amount of seepage in rear of their home and water accumulated in their back yard during heavy rains.

1 Mrs. Koblak testified that during the time that the Debtors owned the Residence, they
2 experienced substantial flooding three to four times. During at least one flood, there was
3 sewage in the water. Additionally, seepage occurred through the back basement wall, that
4 ultimately required sealer to be applied. Mrs. Koblak stated that to help prevent standing
5 water in the backyard and to control the flooding, in approximately 1995, the Debtors
6 landscaped their backyard. The landscaping included the installation of two raised flower
7 beds and two trenches to redirect water from the neighbors' yards to a drain located in the
8 Debtors' backyard. In addition, the Debtors installed a drain cover to prevent leaves from
9 accumulating and blocking the drain. Mrs. Koblak also acknowledged that the Debtors
10 contacted the City of Garfield Heights Service Department to clear roots from the sewer line
11 leading to their property. Mrs. Koblak testified that after this work was performed, the Debtors
12 had no further standing water. The Debtors also made cosmetic changes to the basement,
13 including replacing paneling, wallpaper, molding, and tile.

15 Although Mrs. Koblak was unsure of many dates, she testified unambiguously that the
16 last flood in the Residence occurred approximately two to three years prior to selling the
17 Residence to the Plaintiff. Mrs. Koblak also admitted that during the nine years that the
18 Debtors owned the Residence, they contacted the City of Garfield Heights Service
19 Department 17 times to remind them to check that the sewer lines running toward the
20 Residence were clear and that water was flowing properly. She testified that as long as the
21 roots were removed from the drains, the Debtors did not have flooding problems.

23 The Debtors' answers to interrogatories in a prior state court proceeding admitted that
24 they had previously complained about water or sewer problems in their basement or backyard
25 to the mayor, sewer department, neighbors, and family. The Debtors answered that they

1 never informed the Plaintiff about any water problem in the backyard because they believed
2 the problem had been remedied.

3 The Plaintiff testified that since purchasing the Residence, she has noticed an
4 unsanitary smell, seepage in the basement, and water accumulations in the backyard
5 whenever it rains. She stated that she has had two massive floods in the Residence
6 occurring on May 10, 2003, and July 6, 2003. During the floods, water, sewage, and dirt
7 poured into the basement, resulting in water accumulations of up to four inches. The Plaintiff
8 declared that the damage to the basement was extensive, and that it took 12 hours to clean
9 up after each flood. The Plaintiff's testimony and photographs document damage to the
10 basement, including lost personal property, mold on the walls and door posts, and damaged
11 floor tile and wall covering. The Plaintiff's testimony is found to be credible.

13 After the second flood, the Plaintiff spoke with the Garfield Heights Mayor, Engineer
14 and other officials, as well as her own contractors in order to determine the cause of the water
15 problem. The Plaintiff was advised that the Residence's storm and sanitary lines were
16 improperly combined. In August, 2003, the City of Garfield Heights Building Department
17 discovered and also repaired two clogged and improperly installed storm laterals. In October,
18 2003, Berea Contractors removed footer tile from the sanitary line, installed a new storm line
19 and connected it to the opening installed by the county, and installed a sump pump.

20 The Plaintiff alleges estimated losses and expenses of \$27,813, less \$3,066 from an
21 insurance settlement, for a total of \$24,747.

22 **CONCLUSIONS OF LAW AND DISCUSSION**

23 To establish nondischargeability under 11 U.S.C. § 523(a)(2)(A), a creditor must
24 demonstrate by a preponderance of the evidence each of the following five elements:
25

1 (1) misrepresentation, fraudulent omission, or deceptive conduct by the debtor;
2 (2) knowledge of the falsity or deceptiveness of his or her statement or conduct;
3 (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's
statement or conduct; and (5) damage to the creditor proximately caused by its
reliance on the debtor's statement or conduct.

4 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th
5 Cir. 2000) (citing American Express Travel Related Servs.Co. v. Hashemi (In re Hashemi),
6 104 F.3d 1122, 1125 (9th Cir. 1996), as amended (1997); Citibank (South Dakota), N.A. v.
7 Eashai (In re Eashai), 87 F.3d 1082, 1086 (9th Cir. 1996)). A creditor need only justifiably rely
8 on representations by the Debtor. Field v. Mans, 516 U.S. 59, 74-75, 116 S. Ct. 437 (1995).
9 A person is justified in relying on a representation of fact even though he may have
10 ascertained the falsity had an investigation been made. Field, 516 U.S. at 70-71.

12 Applying the above elements to this case, the admissible evidence establishes that the
13 Residence experienced at least some sewer, drainage, and water seepage and accumulation
14 problems prior to the Debtors' purchase of the Residence in 1993. It is uncontroverted that
15 these problems continued during at least the early years that the Debtors owned the
16 Residence, during a flood occurring in 1999 or 2000, and after the Plaintiff purchased the
17 Residence in 2002. The Court concludes, and the Debtors conceded during trial, that their
18 statements or omissions contained in the Disclosure Form were representations for purposes
19 of 11 U.S.C. § 523(a)(2)(A). The issue then is whether there were sufficient problems so that
20 they should have been clearly detailed in the Disclosure Form.

22 Mrs. Koblak's trial testimony regarding the drainage and flooding problems was
23 incomplete with respect to dates, and in some instances inconsistent. Mrs. Koblak testified
24 that after the landscaping in the backyard was completed in 1995, and the roots from the
25 sewer lines were cleared, the Residence no longer experienced water accumulation or

1 seepage problems. Yet she also testified that she had water problems in the more recent
2 flood occurring two to three years prior to the sale of the Residence to the Plaintiff. This
3 testimony indicates that the drainage and flooding problems were not resolved after the work
4 performed in 1995.

5 Mrs. Koblak also admitted that the Debtors contacted the City of Garfield Heights
6 Service Department 17 times to remind them to check that the sewer line running toward the
7 Residence was clear. She testified that after the sewer line initially was cleared of roots, there
8 was no more flooding because the Debtors had learned to check the lines. It is reasonable to
9 infer that but for these constant reminders to that city service department, the sewer line
10 would become clogged and result in additional flooding. The Debtors, however, did not
11 disclose this information, even though the Disclosure Form, paragraph B, required the
12 Debtors to disclose any "other material problems with the sewer system servicing the
13 property."
14

15 Nor did the Debtors disclose that they had altered the landscaping in the backyard to
16 prevent flooding. Based on the Debtors' experiences prior to the landscaping work performed
17 in 1995, and their alleged experiences thereafter, it is reasonable to infer that landscaping and
18 drain work was necessary to prevent standing water and flooding. The Disclosure Form,
19 paragraph I, required the Debtors to disclose any alterations to the property or other attempts
20 to control any flooding, drainage, settling or grading problems within the past five years. The
21 Disclosure Form, paragraph L, required the disclosure of material defects. Mrs. Koblak's
22 testimony establishes that it may have been a necessity to maintain the altered landscaping to
23 control flooding and drainage problems. Yet the Debtors did not disclose this information.
24
25

1 Based on the foregoing, the Plaintiff has established by a preponderance of the
2 evidence that the Debtors misrepresented or fraudulently omitted information concerning the
3 ongoing sewer and landscaping maintenance that was necessary to prevent the return of
4 historical flooding and drainage problems. The Debtors further misrepresented that there
5 were no more flooding or seepage problems with the basement after the 1995 yard and sewer
6 work, when in fact flooding occurred as late as two to three years previously.

7
8 The evidence relied on for the misrepresentation element also establishes that the
9 Debtors were aware of the falsity or deceptiveness of their omissions and misrepresentations
10 in the Disclosure Form. These problems would not necessarily be easily discovered by the
11 Plaintiff's home inspector, unless there was a heavy rain at the time of the inspection.

12 With respect to the third element of 11 U.S.C. § 523(a)(2)(A), because intent is rarely
13 established by direct evidence, "intent to deceive under § 523(a)(2)(A), can be inferred and
14 established from the surrounding circumstances." Alexander & Alexander of Washington, Inc.
15 v. Hultquist (In re Hultquist), 101 B.R. 180, 183 (9th Cir. BAP 1989). In this case, based on
16 the disclosures made to them in 1993, the Debtors were aware of the historical ongoing
17 flooding and drainage problems with the Residence. The Debtors too experienced these
18 problems first-hand, and as late as the flood two to three years prior to the sale of the
19 Residence. While the Debtors allege that these problems were repaired and were no longer
20 an issue, the Debtors acknowledged that the problems could reoccur if the sewer line was not
21 kept clean, or if the landscaping was not maintained. The Debtors, however, chose not to
22 disclose this information. Based on the totality of the circumstances, the Court concludes that
23 the Plaintiff has established by a preponderance of the evidence the Debtors' intent to deceive
24 by not specifically disclosing these problems.
25

1 Taking into consideration the element of whether the Plaintiff justifiably relied on the
2 Disclosure Form, the Plaintiff testified that even though she financed her own inspection of the
3 Residence, she relied heavily on the Disclosure Form. The Debtors try to establish the
4 unreasonableness of this reliance by pointing to boilerplate language in the Disclosure Form
5 that states that the form is not a warranty or a substitute for an independent inspection. The
6 Debtors, however, acknowledged that statements made by them in the Disclosure Form were
7 representations to the Plaintiff. In this instance, the Plaintiff obtained her own property
8 inspection, but as the inspection was not performed during a period of heavy rain, the
9 inspection failed to reveal drainage or flooding problems. Accordingly, it is reasonable for the
10 Plaintiff to rely on the Disclosure Form, since its obvious purpose is to provide prospective
11 buyers with information about a residence known only to a previous owner. The Plaintiff has
12 established by a preponderance of the evidence that she justifiably relied on the Disclosure
13 Form.
14

15 As for the final element, the Court concludes that the Plaintiff experienced recoverable
16 damages consisting primarily of lost property and repair costs.

17 The Court is required to determine what, if any, damages were proximately caused by
18 the Plaintiff's reliance on the Debtors' statements or conduct. The United States Supreme
19 Court has found that the overriding purpose of 11 U.S.C. § 523 is to protect victims of fraud.
20 Muegler v. Bening, 413 F.3d 980, 983 (9th Cir. 2005), cert. denied, 126 S.Ct. 1149 (2006)
21 (citing Cohen v. de la Cruz, 523 U.S. 213, 222-23, 118 S. Ct. 1212 (1998)). Thus, the
22 damages recoverable in a § 523(a)(2)(A) action encompass liability arising from the fraudulent
23 conduct, including previously ordered attorney's fees, costs of the suit associated with
24 establishing fraud, treble damages, and other relief established under state law. Cohen, 523
25

1 U.S. at 223. An award of attorney's fees, however, is permitted only if the successful plaintiff
2 could recover them in non-bankruptcy court, in accordance with state law. Bertola v. N.
3 Wisconsin Produce Co. Inc. (In re Bertola), 317 B.R. 95, 99-100 (9th Cir. BAP 2004).

4 The Plaintiff has documented the losses she incurred as a result of the drainage and
5 flooding problems. The Debtors presented no opposing evidence or argument as to what
6 costs should be included or excluded. The Court concludes that the following damages were
7 proximately caused by the undisclosed flooding and drainage problems, and are therefore
8 nondischargeable:
9

10 \$5,900	Work paid for and completed by Berea Contractors;
11 \$192	Loss related to new homeowner's insurance with reduced coverage for years 2004, 2005, 2006 (\$64 x 3);
12 \$500	Deductible paid to Insurance Company for 7/6/03 flood;
13 \$150	Court fee to file adversary complaint letter;
14 \$500	Lost property from floods, including rugs, runner, dehumidifier, etc.;
15 \$1,300	Cleaning supplies, landscaping supplies, drain tile, new plantings, top soil, etc.

16 **Total: \$8,542**

17
18 The Plaintiff has not established that she is entitled to attorney's fees or any of her
19 costs incident to the litigation under either federal or Ohio state law; thus, there is no basis to
20 award these fees and costs. Nor has she has presented legal authority that she is entitled to
21 damages based on evidence not admitted at trial, for example third party estimates of
22 uncompleted repairs or future costs. Additionally, with respect to the request for
23 reimbursement of her time spent cleaning up after the floods, installing the drain tile, and re-
24 landscaping the Residence, the Plaintiff has not established that she accomplished these
25

1 tasks at the expense of earning her nursing wages of \$10/hour. Thus, she has not
2 established that these requested labor costs were "costs" to her.

3 Accordingly, the Plaintiff shall have a judgment against the Debtors in the total amount
4 of \$8,542, and this debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

5 DATED: February 15, 2006

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7 Paul B. Snyder
8 U.S. Bankruptcy Judge
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